

the 16th day of October, 2003
TESTE: LILLIE M. HART, CLERK 10:15am
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA)	
)	
v.)	CRIMINAL No. CR 03-3089,
)	CR 03-3090 & CR 03-3091
LEE BOYD MALVO)	

**COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION
TO PRECLUDE DEATH SENTENCE BASED
UPON THE TERRORISM STATUTE**

Comes Now the Commonwealth of Virginia, by her counsel, and moves this Court to deny defendant's Motion to Preclude Death Sentence Based upon the Terrorism Statutes and in support thereof states as follows:

1. The touchstone of the rule of lenity is ambiguity. If the statute in question is unambiguous the rule of lenity is inapplicable. Callanan v. United States, 364 U.S. 587 (1961); Huddleston v. United States, 415 U.S. 814 (1974); Barrett v. United States, 423 U.S. 212 (1976); United States v. Batchelder, 442 U.S. 114 (1979).
2. The statutes at issue here unambiguously explain both the conduct proscribed as well as the range of punishment allowed. Even the defendant does not allege that these statutes are in themselves ambiguous. Rather, the defendant claims that the capital murder statute, Va. Code §18.2-31(13), is in "conflict" with the terrorism statute, Va. Code §18.2-46.5. A simple reading of the two statutes reveals that they are in perfect harmony.

Under Va. Code §18.2-31(13) the willful deliberate and premeditated killing of another in the course of an act of terrorism is punishable as a capital offense. In the case of Va. Code §18.2-46.5, one who commits or conspires to commit or aids

and abets the commission of an act of terrorism is guilty of a Class 2 felony if the base offense of the act of terrorism may be punished by life imprisonment. The phrase “act of terrorism” is defined in Va. Code §18.2-46.4 by reference to Va. Code § 19.2-297.1(A), which includes first degree murder.

Defendant’s argument that Va. Code §18.2-31(13) imposes capital punishment for the “same offense” punishable as a Class 2 felony under Va. Code §18.2-46.5 ignores the fact that there is more than one type of first degree murder punishable under Virginia law. In addition to first degree murder that is willful, deliberate and premeditated, Va. Code §18.2-32 classifies certain felony murders as murders in the first degree. Thus, first degree felony murder committed in the course of an act of terrorism may be punishable under Va. Code §18.2-46.5, but it is not a capital offense under Va. Code §18.2-31(13). The latter section makes a willful, deliberate and premeditated killing in the course of the commission or attempted commission of an act of terrorism a capital offense, while the former section covers a different and broader range of conduct and provides a lesser maximum penalty.

3. Even where criminal statutes overlap the prosecutor has the discretion to elect the statute under which it will proceed. In United States v. Batchelder, 442 U.S. 114 (1979) the Supreme Court unanimously rejected the application of the rule of lenity where the defendant was convicted and sentenced to the harsher punishment provided under one of two overlapping criminal statutes. The Court in Batchelder recognized the long standing principle that “when an act violates more than one criminal statute, the government may elect to prosecute under either so long as it does not discriminate against any class of defendants.” Id. at 123, 124. “Just as a defendant has no

constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.” Batchelder 442 U.S. at 125. “So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of due process are satisfied.” Id. at 123.

Respectfully submitted.

RAYMOND F. MORROGH
Deputy Commonwealth’s Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Commonwealth’s Opposition was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 15th day of October, 2003.

RAYMOND F. MORROGH
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